

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of	)	
	)	
Improving Public Safety Communications	)	
in the 800 MHz Band	)	
	)	
Consolidating the 900 MHz Industrial/Land	)	WT Docket No. 02-55
Transportation and Business Pool Channels	)	

**COMMENTS ON SUPPLEMENTAL COMMENTS  
OF THE "CONSENSUS PARTIES"**

Carolina Power and Light Company ("CP&L")<sup>1</sup> and TXU Business Services ("TXU") (collectively, "Utilities"), by their attorneys, hereby submit their comments<sup>2</sup> on the "Supplemental Comments" of the so-called "Consensus Parties"<sup>3</sup> (herein the "Rebanding Proposal" and the "Rebanding Coalition") in this proceeding. As set forth below, the Rebanding Proposal is fatally flawed, in both substance and process.

The Rebanding Coalition has itself submitted the Rebanding Proposal, essentially as a take it or leave it proposition.<sup>4</sup> Putting aside, to put it mildly, this rather extraordinary condition to "comments" from a group that seeks, indeed already appears to view itself as endowed with Commission function and authority, the

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<sup>1</sup> These Comments are also filed on behalf of CP&L's affiliated utilities: Progress Energy, Florida Power Corporation, and North Carolina Natural Gas.

<sup>2</sup> The Utilities hereby incorporate by reference their previous Comments (May 6, 2002); Reply Comments (Aug. 7, 2002); and further Comments on "Consensus Plan" (Sept. 23, 2002) in this docket.

<sup>3</sup> *Public Notice*, Wireless Telecommunications Bureau Seeks Comments on "Supplemental Comments of the Consensus Parties" Filed in the 800 MHz Public Safety Interference Proceeding – WT Docket 02-55, DA No.03-19 (WTB Jan. 3, 2003); and Order Extending Time for Filing of Comments – WT Docket 02-55, DA No. 03-163 (WTB Jan. 16, 2003).

<sup>4</sup> Supplemental Comments at 3-4.

Utilities urge the Commission to take back the initiative in this proceeding from this self-appointed and unrepresentative consortium of parties.

**I. THE BASIC, UNDERLYING PREMISE OF THE PROPOSAL -- THAT COMMUNICATIONS NETWORKS PROTECTING THE NATION'S CRITICAL INFRASTRUCTURE SHOULD BE SACRIFICED TO SATISFY THE COMMERCIAL WISHES OF NEXTEL AND THE DESIRES OF ADVOCATES OF MORE SPECTRUM FOR OTHER PUBLIC SAFETY SYSTEMS -- IS FUNDAMENTALLY WRONG.**

From Nextel's original proposal to shove critical infrastructure systems into virtually unusable frequencies in the 700 MHz band to the new so-called "Consensus Plan" to move and lock such systems into an interference prone Guard Band, the basic premise of Nextel and the Rebanding Coalition has been that critical infrastructure systems should be sacrificed to pave the way for Nextel and others to carve up the 800 MHz band and to secure other valuable spectrum for their own needs.

That premise, always underlying but never expressly stated by this consortium of interests, comes through loud and clear with their latest installment of their Rebanding Proposal which is chock full of protections and rights for Nextel and public safety pool licensees, full as well with spectrum sweeteners for commercial systems looking for more 900 MHz spectrum, but contains little comfort for critical infrastructure systems. The disparate treatment between critical infrastructure systems, on the one hand, and public safety pool licensees and Nextel, on the other, is enmeshed throughout the Rebanding Proposal. Some of the more salient, but by no means all of the inequities of the Rebanding Proposal include the following:

- Critical infrastructure systems will bear the brunt of Nextel's interference in the newly created Guard Band. Rather than making Nextel truly fix the interference problems that it has created, the Rebanding Proposal would shift the burden of this interference to critical infrastructure systems which would be locked into a Guard Band and forced to accept higher levels of interference than would be public safety systems whose way will be paid out of the Guard Band.

- Critical infrastructure systems will be frozen in place. Under the Rebanding Proposal, critical infrastructure systems will be denied the ability to obtain additional or modified frequencies in the 800 MHz band for years to come.<sup>5</sup> Even those that operate in the 900 MHz band have and are likely to see continuing and increasing shortages of available spectrum as other systems are pushed into that band.<sup>6</sup> Public safety systems, by contrast, are subject to no freeze and are promised access to additional 800 MHz spectrum. As for Nextel, it gets vast new and more valuable spectrum and incredible flexibility during the rebanding period to assure it of continuing available spectrum.
- Critical infrastructure systems will have no say in how the Rebanding Proposal is implemented and will effectively be denied even a right to seek Commission redress. The Rebanding Coalition would have its rules administered by a so-called “Relocation Coordination Committee” or “RCC,” whose decisions would, in most cases, be unreviewable by the Commission and, even when review would be permitted, entitled to “great weight.”<sup>7</sup> There is no representation of critical infrastructure systems on the proposed RCC. By contrast, Nextel gets a seat on this Committee and veto rights over the Committee’s fund administrator; public safety pool coordinators get two seats; and the remaining two seats, while not yet designated, are very clearly reserved for coordinators who are part of the Rebanding Coalition and who do not represent critical infrastructure systems.<sup>8</sup>

The Utilities urge that the premise reflected by the above and the would be result of the Rebanding Coalition’s efforts are quite simply wrong. At a time when the nation is asking operators of nuclear and other conventional electric plants and distribution

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<sup>5</sup> Despite its characterization by the Rebanding Coalition as “temporary,” even if the proposed timetable for rebanding were implemented as scheduled, the proposed 800 MHz freeze would last for years. Coming as it does from Nextel, the basis for this freeze, to “prevent speculators from ‘grabbing up’ the remaining ‘white space’ on ... channels” is really quite extraordinary. See Supplemental Comments at 26.

<sup>6</sup> CP&L, in particular, has already been thwarted in efforts to improve its 900 MHz system operations by a lack of available channels that appears to have been created by a great push for spectrum recently in this band. Given the economic climate, CP&L questions how much of this activity reflects genuine need versus how much reflects a speculative rush toward this band in anticipation of Nextel’s two-for-one offer. In any event, with shortages of spectrum available for existing critical requirements, an offer of twice as much spectrum as justified by actual system requirements cannot be squared with sound frequency policy or the public interest.

<sup>7</sup> Supplemental Comments, Appendix C-22.

<sup>8</sup> See Section IV of these Comments, *infra*.

networks, suppliers of natural gas and others to redouble their efforts to secure and make more efficient their networks, it would be folly, to the worst degree, to relegate these systems to interference prone Guard Band frequencies and to deny them any ability to expand, or even adjust, their networks either to improve their security apparatus, to quickly and safely respond to potentially widespread service disruption to their customers, or to otherwise improve their customer service. Further, leaving the fate of their operations to a private coalition which has already evidenced its disregard, if not contempt, for the operating requirements of critical infrastructure systems would be an anathema to the public interest, and contrary to law.

**II. COMMUNICATIONS NETWORKS PROTECTING NUCLEAR POWER PLANTS AND OTHER CRITICAL INFRASTRUCTURE SYSTEMS SHOULD NOT BE RELEGATED TO AN INTERFERENCE-PRONE GUARD BAND.**

Instead of fixing the interference problems that have been created by Nextel, the essence of the deal that Nextel has struck with the public safety groups and others who also have joined the Rebanding Coalition is to shift the burden of this interference to others, including critical infrastructure systems, who are not part of this so-called consensus group. Thus, because of the greater threat of interference in this part of the band, not just from Nextel's current operations, but from what is likely to be the far more intensive use of frequencies adjacent to this part of the band as its frequencies are consolidated in accordance with its plan, all public safety licensed systems are granted the right to relocate out of the Guard Band and to be reimbursed for the costs of doing so. On the other hand, critical infrastructure licensees already occupying this part of the band (in the case of CP&L, a system that provides essential communications and security for a nuclear power plant and the surrounding areas), as well as others subject

to relocation, will be left to suffer with the interference of Nextel's operations as they are intensified over time in adjacent spectrum.<sup>9</sup>

The Rebanding Coalition suggests that the RCC (as discussed below, essentially the Rebanding Coalition recast in another form) might consider requests by non-public safety pool systems to be relocated outside of the Guard Band<sup>10</sup> and there appears to be some recognition that "mission critical" systems should not operate on those frequencies.<sup>11</sup> Yet, no mechanism whatsoever is offered for "mission critical" systems already operating on these frequencies to escape the Guard Band, or the interference threat that encompasses it. Further, even if allowed to escape, the Rebanding Coalition insists that mission critical systems pay their own way out.<sup>12</sup> In a plan that would compensate Nextel for its costs of relocation,<sup>13</sup> public safety systems, including those wishing to exit the Guard Band for their relocation costs, pay for regional planning committee activities,<sup>14</sup> nearly 12 million dollars in coordination fees and another 19 million dollars in "consulting fees,"<sup>15</sup> the equity behind requiring critical infrastructure systems to pay their way out of the Guard Band, assuming there is any place for them to go, is hard to imagine, and is certainly left unaddressed by the Rebanding Coalition.<sup>16</sup>

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<sup>9</sup> That threat is reflected, among other ways, by the differing thresholds and other criteria that the Rebanding Coalition would use to define "interference" inside and outside the Guard Band. *See, e.g.,* Supplemental Comments at F-3 and F-8. With all due respect, interference is interference; the problem does not go away by defining it differently once only those whom the Rebanding Coalition appears to regard as less deserving systems are subject to its brunt.

<sup>10</sup> *Id.*, at 10.

<sup>11</sup> *Id.*, Appendix C-20.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*, Appendix C-23.

<sup>14</sup> *Id.*, at 28, n.45.

<sup>15</sup> *Id.*, at A-6, A-12. The would be recipients of such "consulting fees" is unstated.

<sup>16</sup> Given that the Rebanding Coalition offers no reimbursement for relocation out of the Guard Band, we do not address here, in any great depth, the adequacy of the funding mechanisms shown. By definition, such costs are not covered. Even for what would be covered, the "Consensus Plan" offers little assurance that Nextel actually will pay what

### **III. CRITICAL INFRASTRUCTURE SYSTEMS REQUIRE ACCESS TO FREQUENCY TO MEET NEW AND CHANGING DEMANDS ON OTHER NETWORKS.**

The proposed freeze on new applications for frequencies necessary to critical infrastructure operations in the 800 MHz as well as the potentially overwhelming effect on available capacity in the 900 MHz band created by the rebanding proposal all serve to prevent critical infrastructure systems from effectively responding to the new and changing demands on their networks. Coming as it does at a time when utilities and other similarly situated providers are being pushed to increase the security of their networks and improve their ability to respond to system outages, whether by natural or other cause, such a freeze would be severally detrimental to the public interests.

Such a freeze on access to additional frequencies, moreover, to which neither public safety pool licensees nor Nextel would subject, is reflective more broadly of the lack of consideration for such systems that appears to be part of the mindset of the Rebanding Coalition. Neither Nextel nor public safety pool systems, nor commercial licensees interested in Nextel's "two-for-one" 900 MHz swap offer, would accept for themselves an extended freeze on their ability to modify or expand their networks. But, somehow they see critical infrastructure differently, either as less important or, for some, perhaps a better target for commercial services, if their own systems can't be modified or expanded to meet necessary requirements. The Utilities urge that such a limited view of the value and necessary vitality of critical infrastructure systems should and must not be accepted.

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it "volunteers," insufficient remedy if it does not (by contrast, the "Consensus Plan" is by no means short of draconian remedies against incumbent critical infrastructure licensees who do not move in lock step with the Plan as presented), and no assurance at all that the funds will be sufficient, or plan for what happens if they are not. The very fact that two separate funds are proposed suggests more than a little doubt by the public safety participants in the Rebanding Coalition that the funds allocated for non-public safety system relocation will be adequate.

**IV. NEITHER THE “REBANDING COALITION” NOR THEIR PROPOSED RELOCATION COORDINATION COMMITTEE (RCC) IS REPRESENTATIVE OF CRITICAL INFRASTRUCTURE SYSTEMS; THE PROPOSED DELEGATION OF COMMISSION AUTHORITY TO THE RCC AND ITS “PLANNING COMMITTEES” AND THE “RELOCATION FUND ADMINISTRATOR” WOULD BE UNLAWFUL.**

Despite their continuing assertions of representative status, the numerous and extensive comments already submitted to the Commission by so many affected entities in opposition to the Rebanding Plan demonstrate how much opposition there is to this so-called consensus. Further, regardless of who the Rebanding Coalition may or may not represent, it absolutely does not represent the vast majority, if any, critical infrastructure licensees, nor has the process in which it has developed their “consensus” proposals been an inclusive one. The Rebanding Coalition has never been willing to entertain considerations of solutions that do not require rebanding nor to offer critical infrastructure systems comparable protection to that offered to public safety pool licensees – to such issues the response the Utilities has received is “we’re not here to debate philosophy.” Even as to more limited matters where it was suggested that the Rebanding Coalition might be receptive to discussion, such as with respect to Guard Band issues, the ultimate “plan” is woefully inadequate.

The proposed operation of the RCC and its associated “planning groups,” would effectively grant the same unrepresentative group that among themselves negotiated the Rebanding Proposal the virtually unreviewable power to implement the plan they propose. Thus, three of the five members of this committee, and two out of the three of each proposed “planning group” would be Nextel and a public safety pool coordinator.<sup>17</sup> The remaining minority members of the committees would, given the Utilities understanding of their voting power within the LMCC, almost to a certainty,

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<sup>17</sup> *Id.*, Appendix C-5 and C-6.

be coordinator entities<sup>18</sup> who are included within the Rebanding Coalition. There would, accordingly, be little or no protection for critical infrastructure licensees, probably not even a voice in their fate before the RCC. Further, with the RCC given virtually unlimited and unreviewable discretion under the proposed plan, there would not even be an effective right of appeal for protection to the Commission.<sup>19</sup>

Even before the full scope of the proposed delegation of Commission authority to the RCC was disclosed by the Rebanding Coalition, the Utilities demonstrated in their earlier comments that such a delegation of authority to private special interest groups would be unlawful.<sup>20</sup> Nowhere in the Supplemental Comments does the Rebanding Coalition respond to or address these issues heretofore raised. Nor is there the slightest explanation, much less convincing demonstration, of what legal authority would entitle the Commission to delegate to such a private consortium the enormous power they now seek.

**V. THIS PROCEEDING SHOULD BE REFOCUSED ON TECHNICAL, NOT POLITICAL, SOLUTIONS.**

For over a year, at least since Nextel submitted its rebanding proposal in November, 2001,<sup>21</sup> the matter of remedying interference in the 800 MHz band has appeared to take a back seat to Nextel and its Coalition partners' larger and more ambitious plans to redivide the 800 MHz band, acquire additional spectrum, and divide the spoils between and among their consortium. Technical solutions designed to address the problems of interference in the band, as recommended by the United

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<sup>18</sup> The coordination fees envisioned by the Rebanding Coalition, *see* page 5 and n.15 of these Comments, *supra*, further calls into question the neutrality of such coordinator entities.

<sup>19</sup> Supplement Comments, Appendix C-30 and C-31.

<sup>20</sup> *See* the Utilities' August Comments at 9-10.

<sup>21</sup> "Promoting Public Safety Communications – Realigning the 800 MHz Land Mobile Radio Band to Rectify Commercial Mobile Radio – Public Safety Interference and Allocate Additional Spectrum to Meet Critical Public Safety Needs," Nov.21, 2001.



Telecom Council ("UTC"),<sup>22</sup> seem to have been given little focus. The utilities urge that this seeming preoccupation with rebanding, and shifting the burden of interference as opposed to remedying it, should end, and a new more focused effort on the technical resolution of interference in the 800 MHz band should be undertaken.

In this regard, the Utilities note that, while different from the UTC plan, which the Utilities continue to support, some of the technical analysis and suggestions made by the Rebanding Coalition in Appendix F to its Supplemental Comments might be melded with the suggestions of UTC and others to reach a true consensus resolution on what can be done, today, to remedy interference in the band. That said, and without getting into every detail of the differences between the technical remedies proposed, the Utilities urge that consideration of the technical proposals made by the Rebanding Coalition be taken outside of the essentially political process that has created it. Accordingly:

- There should be one standard for interference in the 800 MHz band, not multiple standards, as proposed by the Rebanding Coalition,<sup>23</sup> depending upon where in the band a licensee resides, and especially not when one user group in the band is forced to a location where greater interference must be tolerated while another user group is paid to relocate to more protected parts of the band.
- The burden to remedy interference should fall upon those creating it; it is they who should upgrade their systems to prevent it, not the recipients of interference who should be required to upgrade their networks to avoid it. Further, whatever receiver standards may be adopted, they should not be based upon standards unique to a particular class of users in band.<sup>24</sup>
- Finally, interference protection standards should not wait for years of rebanding implementation to be completed, if ever.<sup>25</sup> Indeed, given the constant drum beat

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<sup>22</sup> United Telecom Council, Comments in WT Docket No. 02-55 (Aug. 7, 2002).

<sup>23</sup> See Note 9 of these Comments, *supra*.

<sup>24</sup> Compare Supplemental Comments at 41.

<sup>25</sup> There remains no answer under the Rebanding Plan if Nextel fails to come up with its "contribution" of funds or if more money than what has been promised is necessary to complete the process.

of Rebanding Coalition about how urgent the problems are – so urgent they say that there isn’t time to consider technical resolution other than through rebanding – it is sadly ironic how willing they appear to be put the implementation of real interference safeguards off so far into the distant future.<sup>26</sup> This alone, the Utilities urge, should at least give pause as to what the primary agenda of the Rebanding Coalition is, and whether this is an agenda that the Commission should be following.

## V. CONCLUSION.

The solution to the problems of interference in the 800 MHz band cannot be found in the divide and conquer strategies of the Rebanding Coalition. Rather, interference remedies need to be implemented that fairly protect all licensed users in the band, including licensees of systems that protect the nation’s critical infrastructure facilities.

Respectfully submitted,

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<sup>26</sup> Supplemental Comments at F-1.